United States Department of Agriculture
FARM CREDIT ADMINISTRATION
Washington, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

*
* *

Prepared under the direction of

L. S. Hulbert
Office of the Solicitor
Washington, D. C.

For the

COOPERATIVE RESEARCH AND SERVICE DIVISION

Summary No. 16 December 1942

TABLE OF CONTENTS

FINANCIAL INTEREST OF WITHDRAWING MEMBERS IN AN ASSOCIATION

The status of funds furnished by deductions for capital purposes by members of an association who had withdrawn therefrom was involved in the case of Driscoll v. East-West Dairymen's Association, 122 P. 2d. 379, decided by the District Court of Appeals of California:

> The defendant dairymen's association is a nonprofit organization created and existing under the laws of this state, the statute governing such associations being now found in the Agricultural Code, Section 1191 et seq., having been taken directly from the Civil Code, section 653bb et seq. * * * *
>
> Each association, under its bylaws, may provide for any or all of the following matters:
>
> * * * * * * * * * *
>
> (j) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors; and the conditions and terms for the repurchase by the corporation from its stockholders of their stock upon their disqualification as stockholders. In case of the expulsion of a member, and where the bylaws do not provide any procedure or penalty, the board of directors shall equitably and conclusively appraise his property interest in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion.

The defendant association adopted a bylaw pursuant to which the money in question was deducted, reading as follows:

> Each person upon becoming a member of the Association shall pay to the Association one-half cent per pound on every pound of butter fat delivered by him to the Association, or marketed or

> disposed of through the facilities provided by this Association; said sum to become due and payable on the first day of each and every month, and said sum shall be deductible by said Association from the sums due each member for milk delivered during the preceding month.

Deductions were made by the association in accordance with the terms of the foregoing bylaws. On the withdrawal of certain members from the association, they assigned their interests in and to the amounts which had been so deducted to the plaintiff and she thereupon brought suit for the purpose of recovering the amounts involved from the association.

It appeared that the association had adopted a bylaw which is not set forth in the opinion but which, apparently, provided that amounts furnished by members of the association pursuant to the bylaw set forth above would be distributable only upon the liquidation of the association to those entitled thereto. The plaintiff contended that language in a section of the Cooperative Act of California, under which the association was incorporated, made it mandatory on the association to adopt a bylaw setting forth "the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member * * *."

The plaintiff contended that the word "may" appearing in the statement "each association under its bylaws may provide for any or all of the following matters" (underscoring supplied) should be interpreted as meaning must. In refusing to adopt this construction, the Court said:

> Appellant argues that the permissive "may" becomes "must" and that no discretion nor alternative remains in the association in regard to its by-laws; in other words, that all associations are commanded to adopt by-laws and that such by-laws are set forth in the section quoted. It is conceded that in certain instances the word "may" has the effect of "must". But, ordinarily, the use of the permissive term carries no mandate. It is only where the context indicates or where the object to be attained compels such a construction that the imperative shall be deemed the legislative intent. The legislature, in adopting the provisions setting up a voluntary non-profit organization, would not ordinarily cast the mandatory provisions in permissive form. If it had been the legislative intent to set up a rule of conduct for all such associations and to prescribe and limit the rights and liabilities accruing through membership therein, it would have done so without the unnecessary mechanics of separate bylaws for each organization to be thereafter formed. We note also that the subdivision of section 1200 quoted, subd. j, refers to bylaws governing expulsion and what the bylaws may provide in that respect. It is apparent that the term "may" does not mean "must" in the latter case for the obvious reason that

provision is made for the expelled members in cases where the bylaws are silent. It is thus apparent that while the associations might or might not provide for immediate purchase and payment for the interests of members voluntarily withdrawing, it could not enforce expulsion without fair compensation.

We hold that the phrasing of the section does not compel or warrant the mandatory construction. We may then consider the general purposes of all such legislation and the end sought to be accomplished thereby.

The Court further said:

In the case before us, plaintiff and her assignors have received in full all paid dues they were entitled to receive, namely, the benefits accruing to them from the organization and collective marketing during the period of their membership. The plan of the defendant association and its members was and is to further expand to the extent of procuring or erecting permanent plants and equipment, and the funds available therefor inure to the benefit of those who, at present, constitute the association and to those who may subsequently join therein. Plaintiff became a member by his own volition and submitted to the bylaws which are now attacked.

It would be a futile task to attempt any present accounting, in the absence of a right to distribution or payment, for the obvious reason that, in a going concern, the amount due upon future distribution would vary and become subject to the vicissitudes of the intervening period.

The questioned bylaw, being in all respects valid and binding, is determinative of the rights of all parties to the present action.

As indicated above, the Court specifically held that the statute under which the association was incorporated did not require the association to adopt a bylaw providing the manner in which the value of member's interests would be ascertained and providing for their purchase in the event of their withdrawal. In this connection, attention is called to the fact that the statute did not specifically authorize the adoption of a bylaw providing for the distribution of the assets of the association on its liquidation. The Court, apparently, proceeded on the theory that the enumeration in the statute of matters and things with respect to which an association might adopt bylaws was not exclusive and did not interfere with the association adopting the bylaw providing for the distribution of assets on the liquidation of the association.

In some instances, however, bylaws have been held void which did not come "within the limitations" of the statute under which the association was incorporated. Lewis v. Monmouth Farmers' Cooperative Association, 105 N. J. Eq. 257, 147 A. 550; Vol. 2 Thompson on Corporations, 3 Ed., Section 1066. But, generally speaking, if a bylaw is invalid as a bylaw, if it is not opposed to public policy, it is generally enforced as a contract between the members and between the association and its members, at least with respect to those members who voted therefor or consented thereto. Strong v. Minneapolis Automobile Trade Ass'n., 151 Minn. 406, 186 N.W. 800; New England Trust Co. v. Abbott, Ex'r, 162 Mass. 148, 38 N.E. 432, 27 L.R.A. 271; Searles v. Bar Harbor Banking Trust Company, 128 Me. 34, 145 A. 391, 65 A.L.R. 1154.

Attention is called to the fact that the Court, in the instant case, said: "Plaintiff became a member by his own volition and submitted to the bylaws which are now attacked."

Although the point is not discussed in the opinion, it is worthy of note that a member of a non-stock association, on withdrawing therefrom, at common law, is not entitled to receive anything from the association, and on withdrawing, he loses whatever "interest" he may have had in the association. If the association in the instant case had had no bylaw relative to the distribution of its assets on the dissolution of the association, it would appear that this would have amounted to an election to have the common law control. Of course, at common law, if no such bylaw had been adopted in the instant case, no recovery could have been had by the plaintiff at any time, because as indicated, at common law, one who ceases to be a member of an association for any cause, in the absence of express provisions to the contrary, loses his interest in the association and in turn is free from any further liability. Clearwater Citrus Growers' Ass'n. v. Andrews, 81 Fla. 299, 87 So. 903; Union Benev. Soc. v. Martin, 113 Ky. 25, 67 S.W. 38; Dade Coal Co. v. Penitentiary Co., 119 Ga. 824, 47 S.E. 338; Henry v. Cox, 25 Ohio App. 487, 159 N.E. 101; Missouri Bottlers' Ass'n. v. Fennerty, 81 Mo. App. 525; Texas Employers Insurance Association v. Humble Oil & Refining Co., 103 S.W. 2d 818; Massaro v. Tampa Better Mills Producing Co-op., _____ Fla._____, 200 So. 211; 5 C. J. 1360, 19 R.C.L. 1267.

A clear distinction should be drawn between a claim of a person against an association based on his membership and a claim arising out of a contract. Ordinarily, the fact that a member has withdrawn from an association does not excuse an association from paying him all amounts to which he is entitled under any contract which he has with the association. Hood River Orchard Co. v. Stone, 97 Ore. 158, 191 P. 662, 666; Bogardus v. Santa Ana Walnut Growers' Association, ___ Cal. App. _____, 108 P. 2d 52.

Contract Not Invalidated by Bylaw

In the case of Whitney v. Farmers' Co-op. Grain Co., 110 Neb. 157, 193 N. W. 103, the question was presented of whether a contract entered into by the cooperative association to repurchase its stock was abrogated by the repeal of a bylaw providing for the purchase of the stock. It appeared that at the time Ross Whitney became a stockholder a contract was entered into with him which was called a prospectus, in which the association agreed to "Pay back to any shareholder leaving the territory the cash he invested." Subsequently, a bylaw was adopted by the association covering this matter reading as follows:

> Any shareholder selling out and leaving the community, thereby establishing his market place elsewhere, may, upon ninety days' notice to the board of directors, receive back from the company the cash he paid to the company for shares of capital stock.

Whitney

> moved from the place where he lived when he purchased the stock, about one and one-half miles from Springfield, Nebraska, to a place about three and one-half miles from Springfield. Appelle claims that between his new home and Springfield there were several heavy hills, which made it necessary for him to change his market place to Richfield, Nebraska, a town about three and one-half miles from his home. Thereupon appellee demanded a return of his money, and appellant refused to return the money, and this action was instituted.
>
> Appellant claims appellee did not move from the community and establish another market place, and, further, that the by-law, which appellee claims was shown him, has been repealed, and that appellee contracted that he would abide by any change or modification in the by-laws after the date of purchase. A jury was waived and the case tried to the court. The court found for appellee and rendered judgment against appellant for a return of the money. To reverse this judgment, appellant has appealed to this court.

In passing upon the basic question of whether the association, as a matter of law, was authorized to repurchase its stock, the court, in holding that it possessed such authority, said:

> The weight of authority seems to be that a corporation may purchase its own shares of stock, unless restrained by its charter, or by statute, or by-law, provided the purchase is made in good faith, without intent to injure creditors or

> stockholders. And especially is this true where the contract of sale and repurchase are inseparable parts of the same instrument. Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376; Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; Adam v. New England Investment Co. 33 R. I. 193, 80 Atl. 426.

In disposing of the contention of the association that Whitney had not changed his market place, the court said:

> Community, as here used, means so much of the territory lying around Springfield as can and will make it a market center. Appellee moved to a community having Richfield as a market place. Richfield was as far away as Springfield from appellee; but it was more accessible because of hills on the Springfield road. The evidence seems conclusive on this question. We are of the opinion appellee moved out of the Springfield community as a marketing place.

The association urged that Whitney had agreed in his contract

> that he would be bound by future modifications and changes in the bylaws, and claims the bylaw providing for refunding money paid for capital stock, where a stockholder moves into another community, had been repealed. The logical answer to this argument is that the evidence is conflicting as to whether or not this bylaw has ever been changed. This being true, the finding of the trial court will not be disturbed. And what is more, there is no claim that any bylaw has ever been adopted prohibiting the company from purchasing its stock. All that is claimed is that the bylaw providing for refunding money to a stockholder, moving out of the community, has been repealed.

Moreover, the court said:

> But aside from this, we do not understand that the company could abrogate its contract by a by-law.

In a Kansas case involving a situation that was parallel in principle, Loch v. Paola Farmers' Union Co-operative Creamery & Store Association, 130 Kan. 136, 285 P. 523, (rehearing denied, 130 Kan. 522, 287 P. 269), no contract (other than the bylaws) was involved and the association contended that it was not obligated to repurchase its stock because the bylaw which was in effect when the stockholder purchased his stock was subsequently repealed. Apparently, the court regarded the right to have the stock repurchased by the association in pursuance of the bylaw as a

vested right and one which could not be adversely affected by the repeal of the bylaw, because the court said:

> Purchase of the shares pursuant to the by-law constituted a contract with the corporation which could not be abrogated by simple repeal of the by-law.

The rule appears to be established that where an association has obligated itself by contract, or by bylaw, to repurchase stock under specified conditions, that the association is bound thereby, but the rights of creditors must be respected. See: Lebens, as Receiver of the LeSueur County Cooperative Company v. Nelson, 148 Minn. 240, 181 N. W. 350, 352. In a recent Florida case it was held that an association was required to abide by the terms of its bylaws with respect to the repurchase of stock. See: Adams v. Sanford Growers' Credit Corporation, 9 So. 2d 713.

As a matter of policy, it is believed that cooperative leaders generally are of the opinion that an association should repurchase its stock or other capital equities of members only at its discretion. This makes it possible for an association to retire or revolve capital equities only when it is in a financial position to do so.

COOPERATIVE DENIED PERMIT TO OPERATE PUBLIC MARKET

The case of West Central Producers Cooperative v. Commissioner of Agriculture, 20 S. E. 2d 797, decided by the Supreme Court of Appeals of West Virginia, involved the question of whether the public marketing act of that State was applicable to cooperative associations. This statute enacted in 1939 made it a criminal offense to operate a public market without the permission of the Commissioner of Agriculture of that State. A section of that statute provided that:

> It shall be unlawful for any public market to be operated in this state without first having obtained from the commissioner of agriculture of West Virginia a permit therefor. Upon the filing of an application for such permit, the commissioner shall fix a time and place for hearing thereon and, after hearing, if it appear that the public interest require the same and that there is sufficient need for such market in the locality in which it is proposed to be established, shall grant such permit, or deny the same if the contrary appear.

The West Central Producers Cooperative Association was incorporated under the Cooperative Marketing Act of West Virginia. In accordance with the statute under which it was organized, the Association was authorized to "engage in any activity in connection with the marketing, selling * * * of any agricultural products produced or delivered to it by its members or purchased or received by consignment from other persons. * * *." The Association contended that, in view of this grant of power, it had the right to conduct a public market without obtaining a permit to do so from the Commissioner of Agriculture. It applied, however, to the Commissioner of Agriculture for a permit to conduct such a market and the permit was denied. The Association then appealed the proceedings from the Commissioner of Agriculture to the Supreme Court of Appeals of the State of West Virginia. On the appeal the Association asserted that it applied for a permit under the public marketing act, although it believed that the Association was not subject thereto because of "its desire to avoid the risks and penalties involved in the violation thereof by operating such a market without such permit."

In holding that the Cooperative Marketing Act of the State under which the Association was incorporated did not permit the Association to operate a public market without obtaining a permit from the Commissioner of Agriculture, the Court said, in part:

> We do not think the cooperative association statute, Code, 19-4, was intended to cover or authorize the operation of public markets. True, the language of section 4 of article 4 of said statute is broad in that it covers "any activity in connection with the marketing * * * of any agricultural products", but Code, 19-2, in effect prior to the enactment of Chapter 2, Acts 1939, covers markets, and in section 3

thereof provides for auction markets, and the Commissioner is given power to regulate them, and authorized to license auctioneers to conduct sales at such markets. It is quite evident that this statute was intended to provide for the public sale of agricultural products, and on this premise, it may be argued that the Legislature did not intend that public auction markets should be authorized under another article of the same chapter. In the session of 1939, chapter 2, the Legislature enacted a comprehensive statute on the subject of public markets, which we understand was intended to supersede article 2, chapter 19 of the Code. Section 3 of Chapter 2 of the Act provides: "No public market shall hereafter be operated in this state by any person, partnership, firm, association, or corporation except in accordance with the provisions of this act." Section 5 of the act impliedly recognizes the existence of public markets. It provides: "All public markets in bona fide operation during the year one thousand nine hundred thirty-eight, shall, on application and proof of such operation, be granted such permit by the commissioner." Therefore, existing public markets, however established, could, under these sections, continue to operate only by obtaining a permit as provided therein. The act of 1939 expressly repeals all acts and parts of acts inconsistent therewith, and so it is that whatever rights may have existed to operate a public market either under article 2 and 4 of chapter 19 of the Code, or otherwise, were merged in Chapter 2, Acts 1939, and were protected by that act. As we see the matter, West Central must stand or fall under the act of 1939, if the same be constitutional, because its claim to establish a public market was asserted after the passage of that act, and in view of the actual findings of the Commissioner against it, it is not in any event entitled to a permit, and is not entitled to operate under Code 19-4. This brings us to the decisive question in the case, which is the constitutionality of Chapter 2, Acts 1939, and particularly section 4 thereof.

The Association urged that the public marketing act was unconstitutional because it did not contain "a statement of policy and fixed standards by which the delegated powers may be exercised" by the Commissioner of Agriculture. The Court, apparently accepted the point of view that the statute did not prescribe rules or principles to be followed by the Commissioner of Agriculture in determining if a permit to operate a public market should be granted and, in this connection, said (page 302):

> We are unable to see how any standard governing what is termed a public interest, or need for a market, could be set up to control the discretion of the Commissioner in relation thereto. The question of public interest, need

> of additional service on the part of public utilities, or businesses affected with a public interest, the granting of permits and certificates of convenience which depend upon a finding with reference thereto by an administrative board or official, are, in our opinion, not susceptible of being controlled by any fixed standard which the Legislature might set up, and we think this fact has been recognized in legislative history, as the same affects governmental activities which are exercised by executives and administrative boards and officials, under legislative delegation of power.

As indicated, the Court (one justice dissenting) held the statute constitutional and upheld the action of the Commissioner of Agriculture in refusing the cooperative a permit to operate the public market.

This case emphasizes a point which is sometimes overlooked, namely, that a statute which is comprehensive in its terms and contains no exception in favor of cooperative associations is applicable ordinarily to such associations engaged in the business affected. If it is intended that a statute which is general in character is not to be applicable to cooperative associations, a clear exception in favor of such associations should be included in the statute.

Cooperative Not Liable for Sales Taxes on Consignment Goods

In the case of State Tax Commissioner of Arizona v. Martin (Ariz.) 113 P. 2d 340, the question for decision was whether the wholesaler who furnished goods to a cooperative on consignment was liable for the retail sales taxes on the goods so furnished and sold by the cooperative or whether the cooperative was required to pay such taxes. The wholesaler paid the retail sales taxes on the goods in question under protest and then brought suit to recover the amount so paid. The trial court decided the case in his favor and the Tax Commission of the State then appealed. In reversing this decision the Appellate Court said in part:

> The facts out of which the action grows are substantially as hereinafter stated. From May 1, 1935, until the date of the trial appellee, C. M. Martin, was engaged in the wholesale hardware, farm supply, gasoline and lumber business at 1821 east Jackson street, Phoenix, where he has a number of buildings, one of which is a large structure facing north and divided by an east-west partition running almost through its center. The portion south of the partition is occupied by appellee and that north of it by the United Producers & Consumers Co-operative, a corporation, which will be referred to hereafter as the Co-op. Appellee's office and that of his office manager and accounting force is in the part of the building occupied by him near the partition and all the space south or back of this office is a warehouse where goods are received, uncrated and placed on shelves. He has other warehouses, however, east and west of this building and across the street from it.
>
> The Co-op is a nonprofit organization incorporated in 1934 by five persons engaged in agricultural pursuits. It has no capital stock and those wishing to become members of it do so by paying the membership fee of fifty cents fixed by the association's by-laws for which they are issued a certificate of membership entitling the holder to purchase goods from it at cost, and at the time of the trial about 11,700 persons had become members of the organization. It was organized originally to purchase gas and oil at wholesale for the purpose of resale to its members at cost plus the expense of handling. To begin with it rented from appellee a tank in which to store its gas for distribution to its members and also space for its office. It had no money with which to start this venture, so appellee extended it credit, and after its first annual meeting he and the board of directors agreed that he should buy other commodities in large quantities and sell them to the Co-op at wholesale prices for resale by it to its members for cost plus overhead and, according to the testimony, from that time on this was done. Appellee was not an officer of the Co-op and

had no connection with it other than the advancement to it of credit with which to do business, except that he leased to it for $100 per month three business places, namely, the north half of the large structure just mentioned, one across the street for the service department and one to the east for the lumber department.

In the portion of the building north of the partition the Co-op has its office, a "bull-pen" for the cashier and a cash register, and shelves and counters on which goods are displayed. This merchandise is the property of appellee and is taken from the warehouse and placed on the shelves and counters by his employees who keep stock records of it, so as to know for insurance purposes how much he has there and how much in the warehouse. These goods are sold by the Co-op to its members in this way: When a member enters the Co-op's place of business and purchases an article of merchandise the clerk serving him makes out a sales ticket showing whether the purchaser is a member, his name, his Co-op number, the date, amount paid and the description of the merchandise, marks it "paid," all sales being for cash, and turns it into the Co-op's cashier. At the close of the day the Co-op's bookkeeping department segregates the sales tickets into different classes of commodities for which the Co-op has a classification, there being nine in all, for instance, all tickets on gasoline sales being placed in one class, those for hardware in another, those for kerosene in still another, etc., totals them, and the next morning issues a purchase order for them and turns it over to C. M. Martin, wholesaler, stating that the goods have been purchased for resale. The purchase order does not list the individual sales but groups the various commodities according to the different classifications. Upon receipt of the purchase order, appellee makes out a bill for the goods included therein and delivers it to the Co-op, both the purchase order and the bill being for the goods the Co-op sold the previous day. Upon receipt of the bill from appellee the Co-op posts the purchases in its purchase journal as a permanent record of accounts payable and about every other day pays appellee on account, there being at all times a balance due him.

* * * * * * * * * *

In 1937 the tax commission had an audit made of the business transacted by appellee with the Co-op from May 1, 1935, to May 31, 1937, and it disclosed that appellee had sold to the Co-op during this period goods aggregating $655,960.49. Acting upon this report, the commission on August 4, 1937, by virtue of section 14 of the Excise Revenue Act, Code 1939, Section 73-1315, entered an order in writing reassessing appellee with an additional wholesale tax in the sum of $402.13 for this

period, and this was paid by appellee under protest, though all of it except $149.71 was later found to be an error.

On July 19, 1939, the tax commission made an order that the taxes paid by appellee on the goods sold to the Co-op during the periods May 1, 1935, to July 31, 1937, and from November 1, 1938, to January 31, 1939, which had been classified by him in his returns to the commission as sales at wholesale, should have been classified as sales at retail and, acting upon this finding and pursuant to the authority of subsection (a), section 14 of the Excise Revenue Act, assessed against appellee an additional privilege sales tax in the sum of $18,392.60. This was paid under protest and the purpose of this suit is to recover it.

The court heard the case without the aid of a jury and, after considering it for some time, came to the conclusion that the facts, which were undisputed, sustained the allegations of the amended complaint and entitled appellee to judgment for a return of the $18,392.60 he had paid under protest. Whether this action was based on the proposition that appellee's sales to the Co-op were sales at wholesale, in which event he was not subject to the retail tax, or upon the contention that appellants were estopped from assessing an additional privilege sales tax against him because it had theretofore accepted his tax on these sales as a wholesaler, or both, does not appear from the judgment and there were no findings. In his brief appellee contends that the judgment is sound under either theory, but the position of appellants is that it may stand under neither because the undisputed evidence shows, first, that the Co-op was merely the agent of appellee for selling merchandise and that all sales made by it were in fact sales by and for appellee, and, second, that it took the merchandise on consignment to be sold by it as his agent.

(1, 2) The only error assigned is that for the two reasons given the judgment is contrary to and not supported by the evidence. There can be no question but that the goods, wares and merchandise sold by the Co-op during the period involved were at the time they were sold the property of appellee. All the evidence is to this effect. Appellee placed these goods on the shelves and counters of the Co-op's salesroom to be sold by the Co-op mostly at retail and by appellee at wholesale, and the Co-op neither purchased nor paid for them prior to their sale and delivery. The title to them remained in appellee until it passed directly from him to the consumer through the agency of the Co-op, there being no period of time whatever when it rested in the Co-op. The issuance by the Co-op to appellee of a purchase order for these goods, wares and merchandise and the delivery to it by him of a bill for them,

both acts being performed after the goods had been sold and delivered and title to them passed to a third person, could not by any stretch of the imagination have the effect of vesting title to the goods in the Co-op at any stage of the transaction. The only possible conclusion to be drawn from the facts is that the goods were in the salesroom of the Co-op to be sold by it as the agent of appellee and, hence, that they were there simply on consignment from appellee. This being true, the Co-op was merely the agent of appellee for selling the goods, the title to which he had retained until he transferred it to the consumer through his agent. "A consignment of goods for sale," to use the language of the Rio Grande Oil Co. v. Miller Rubber Co. of New York, 31 Ariz. 84, 250 P. 564, 565, "does not pass the title at any time, nor does it contemplate that it should be passed. The very term implies an agency, and that the title is in the consignor, the consignee being his agent." Commercial Securities Corp. v. Babbitt Motor Co., 36 Ariz. 438, 286 P. 820; 15 C.J.S., Consign, 988, first paragraph.

Inasmuch, therefore, as the goods, wares, and merchandise were never sold to the Co-op but were placed in its salesroom by appellee to be sold by it as his agent to ultimate consumers, it follows necessarily that he was liable for the 2% tax imposed by the Excise Revenue Act on the income from retail sales. A sale of his merchandise through an agent rendered him no less subject to the tax than he would have been had he made the sale himself.

The method of furnishing goods on consignment is a rather common business procedure. It is usually followed for the purpose of protecting the interests of the consignor. Under this method of doing business, title to the goods in question remains in the consignor. The consignee, however, has the right to sell the goods and to pass good title thereto with an obligation on his part to account to the consignor for the proceeds. In the case of bankruptcy, it has been held that the consignor is entitled to recover from the trustee in bankruptcy any goods then on hand held by the bankrupt on consignment. Thus in the case of Edgewood Shoe Factories, Etc. v. Stewart, 107 F. 2d 123, 126, the consignor recovered shoes furnished on consignment from the trustee in bankruptcy. In this connection the court said:

All of the authorities are agreed, that there is no prohibition in positive law or in public policy against the handling of goods on consignment, and that the task of the court in determining whether in a particular instance, the relation of parties to goods delivered is that of seller and buyer, or that of consignor and consignee for sale is not to make a contract for the parties, but to ascertain what their contract was. They all agree too, that where the words of the contract are

clear and plain, it must be given effect as written, and that it is only where the meaning is doubtful, that both the agreements and the acts of the parties must be taken into consideration in order to give to them, not a spurious, but a genuine and real effect. All agree then, that if out of the agreement itself alone, if clear and unambiguous, or out of the acts and agreements of the parties, if the agreement is of doubtful purport, there arises an obligation on the part of the apparent consignee to buy and pay for the delivered goods, such that a suit can be maintained by the consignor as creditor, the transaction is one of sale, or agreement to sell, and not of consignment for sale. Whereas, if no binding obligation to buy or pay for the goods, on which consignor could sue, arises out of the agreement alone, or out of the agreement taken with the facts, but only an obligation to account to the consignor for the proceeds of the goods when sold, the relation must be held to be, not one of buyer and seller, but one of consignor and consignee for sale.

See also Ludvigh v. American Woolen Co., 231 U.S. 522, 58 L. Ed. 345, 34 S. Ct. 161.

FAIR LABOR STANDARDS ACT - AREA OF PRODUCTION

Section 13(a) of the Fair Labor Standards Act, 29 U.S.C.A. Section 201 et seq., provides that the wage and hour provisions thereof shall not apply: "(10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural states or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

The Wage and Hour Administrator sought an injunction to compel the Farmers Peanut Company engaged in shelling peanuts at Cairo, Georgia, to observe the Fair Labor Standards Act as to its employees. It was not denied that many of the employees of this company, numbering about 100, were engaged in commerce but the company contended that they were not subject to the Act because of the exception therefrom, quoted above. At the time of trial, the Administrator's definition of area of production limited it to operations on materials from farms in the general vicinity of the establishment if the number of employees engaged in those operations in that establishment did not exceed seven, or if the materials were not produced more than ten miles away and the establishment was in the open country or a rural community, excluding towns of 2,500 or more by the census of 1930. Farmers Peanut Company had more than seven employees in the operations in question and was located in a town of slightly more than 2,500 inhabitants, and so was outside of the "area of production" thus defined. The District Court (37 F. Supp. 628) refused an injunction and, in doing so held:

> That in defining an area of production the Administrator was not authorized to limit the number of employees working together, or to exclude towns which were not great centers of population; it held this establishment to be within the area of production of the peanuts, since they were all produced on farms in the vicinity, so that its employees are excepted from the Act * * *.

The Administrator then appealed the case to the Circuit Court of Appeals for the Fifth Circuit. Fleming v. Farmers Peanut Company, 128 F. 2d 404. In discussing the definition of "area of production" the Court said:

> Since the trial the Administrator has amended his definition so as to raise the critical number of employees from seven to ten, and to eliminate the alternative part which refers to location in a rural community and not in a town, and to procuring the materials from farms within ten miles. The definition now of force is: "An individual shall be regarded as employed in the area of production within the meaning of Section 13(a)(10) * * * (a) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations does not exceed ten." There are

different definitions made with respect to dry edible beans, and to leaf tobacco. This change of definition does not make the case moot. The main issue of enforcing the Act remains. If this were a criminal prosecution, the old definition might be of importance. But the only relief here sought is injunction, which operates in the future. We are therefore now concerned with the new definition, as we would be with an amendment of the statute if one had been made. The question is shifted to the propriety of enforcing the new definition, which like the old excludes the employees here involved from the exception provided by Congress and puts them under the wage and hour provisions of the Act.

The Circuit Court of Appeals affirmed the judgment of the trial court and, in doing so, declared:

> That part of the definition which speaks of materials all coming from the farms in the general vicinity of the establishment, though not very precise, is a legitimate defining of an area of production of agricultural commodities. The word area means a surface, a territory, a region; in this case the territory or region where farm and orchard products are raised. It may be of any extent, and hence the need of defining it. "Vicinity" is some advance because it means nearness, neighborhood, that distance in which producers are neighbors. This may be a greater distance in sparsely settled regions than in thickly populated ones. It excludes distance beyond the range of usual farm travel. But to define an area of production by the number of workers in commerce who work in one establishment is not a true execution of the power given to define. In clear and explicit words Congress excepted from the Act individuals doing certain things about farm and orchard products in the area of their production, no matter how many the workers there might be. The power to define the area does not include the power to limit the exemption by denying it operation when more than seven or ten work together in one establishment. That part of the definition is void; the other part may stand. Manhattan G. E. Co. v. Commissioner, 297 U.S. 129, 56 S. Ct. 397, 80 L. Ed. 528.

As pointed out in the foregoing quotation, it was held that it was not proper for the Administrator to define an area of production with reference to the number of workers employed in a particular establishment.

The Court then held that the shelling and cleaning of peanuts is "preparing them in the raw or natural state for market" within the meaning of that language as used in the exception quoted above. In this connection, the Court said:

> Without doubt peanuts are an agricultural commodity, whether shelled or unshelled. The large Jumbo peanuts raised in

Virginia and Carolina are (as the findings show), mostly marketed unshelled and are roasted in the shell for human consumption. The small Spanish peanuts raised in Georgia, Florida, and Alabama are marketed shelled, to make candy, peanut butter, and salted peanuts. Some are ground and pressed for oil. Preparing them for market may well include shelling, since they are not marketable in the shells or pods. By contrast, washing and sorting alone would be necessary to prepare the Jumbo peanuts for market. The statute makes no point about the preparation being done on the farm or by the farmer, but only that it occur in the area of production. It does not exclude the operation because it might be termed "processing," for pasteurizing, drying and canning of fruit and vegetables are processing, but are expressly mentioned. But the preparing must be in the "raw or natural state." These are not words of art and do not require nor obtain aid in their understanding from botanical or other experts. They do not need the doubtful light of legislative debates. Raw means in common speech not cooked, or refined; and natural state is one that has not been artificially changed. Shelled peanuts, like shelled beans or peas or corn, or threshed oats or wheat, are in a raw or natural state. The peanuts are not really nuts, but peas, the pod and the kernels it contains maturing in the ground instead of in the air. They are commonly called in Georgia (and accurately) "ground peas." The pods have been taken from the ground and from the plant that bore them and the peas are out of the covering pod that nourished them, but they are still the very crop of value that was raised. So corn is pulled from the stalk, the shuck stripped off and the cob removed, all without affecting the raw and natural state of the valuable grain; and wheat is cut and separated from the straw and chaff in the same manner. Peanut shells are of no value. Farmers do not start out to raise them. It is the peanut itself alone which is the valuable product. The shell, like the bean pod or the corn shuck, is only a protective covering, the removal of which does not affect the natural state of the contents. We have no difficulty in concluding that this removal, though done by machinery and off the producing farm and by one not a farmer, is, if done in the area of production, a work excepted from the Act by Section 13(a) (10). We need not specifically search out the aim of Congress, since the words used are plain, but we think the purpose was to treat these operations, when done in the vicinity of the producing farms, as agricultural labor is treated, excepting all alike from the wage and hour provisions of the Act.